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Opinion following rehearing

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TOR CLIFTON CLEVELAND, Defendant and Appellant.	D074469 (Super. Ct. No. FVI1500442)

APPEAL from a judgment of the Superior Court of San Bernardino County, Debra Harris, Judge. Affirmed in part and reversed in part, with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tor Cleveland, his girlfriend, and a female acquaintance were "party[ing]" with Alfred S. in Alfred's home. A dispute arose during which Cleveland beat Alfred while the girlfriend stabbed him repeatedly with a pocketknife. Afterwards, the three visitors fled in Alfred's car. A jury found Cleveland guilty of assault with a deadly weapon (on the theory he aided and abetted his girlfriend's stabbing of Alfred) and carjacking. The jury also found true the allegation that Cleveland personally inflicted great bodily injury on Alfred in connection with the assault. The trial court sentenced Cleveland to 15 years in prison, consisting of 10 years on the carjacking conviction, plus a consecutive five-year enhancement based on Cleveland's admission of a prior conviction for a serious or violent felony. (Pen. Code, § 667, subd. (a)(1).)[1] Cleveland appealed.

This is our second opinion in this appeal. In our original opinion, we rejected Cleveland's challenges to the sufficiency of the evidence supporting the jury's verdicts and true finding. We then granted Cleveland's petition for rehearing to consider his claim that he is entitled to relief under recently enacted Senate Bill No. 1393 (SB 1393), which became effective on January 1, 2019, and amends sections 667 and 1385 to give trial courts the discretion to strike five-year prior serious felony enhancements.

In this opinion, we once again reject Cleveland's challenges to the sufficiency of the evidence supporting the jury's verdicts and true finding. The portions of this opinion that address those issues are substantively the same as in our original opinion. As to the

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1 Further statutory references are to the Penal Code unless otherwise indicated.

new issue, which the Attorney General concedes, we agree that SB 1393 applies retroactively to this case. Accordingly, we remand for the limited purpose of allowing the trial court to exercise its discretion with respect to the prior serious felony enhancement. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Prosecution Evidence

About 10:00 p.m. on January 29, 2015, Alfred drove from his home in Victorville to visit his cousin in San Bernardino. Before heading home an hour or two later, Alfred stopped at a gas station. There, he encountered Cleveland, whom he had first met about one or two weeks earlier, and the two men drank alcohol together. Cleveland said he knew two women who might hang out with them. Alfred thought it was a good idea. Cleveland drove Alfred's car to pick up the women because he was more sober than Alfred and knew where the women were. They picked up two women, later identified as Ayesha Barfield and Crystal Horlacher, and drove to Alfred's house in Victorville to "party."

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2 We summarize the facts under the applicable standard of review: " 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

Once there, the group drank alcohol, and Alfred became "pretty tipsy." He admitted at trial that he had smoked one "joint" earlier that evening before leaving his house, but denied offering the group any drugs. He specifically denied ever using methamphetamine.

Alfred and Cleveland sat in the living room while Barfield and Horlacher cooked and cleaned in the kitchen. Alfred believed that Barfield, whom he understood to be Cleveland's girlfriend, stole a silver neck chain from a container in the kitchen. Alfred told Cleveland "his lady was in [the] kitchen stealing." Cleveland went to the kitchen and talked to Barfield. Alfred could hear that they were arguing, but could not make out specifically what they were saying. As the couple was "fussing real loud," Alfred stood up and said, "[O]kay, y'all, both of you got to get out [of] my house." Cleveland then "c[a]me at" Alfred, and the men argued, then fought.

As Alfred and Cleveland engaged in a fistfight, Barfield also became involved.[3] She hit Alfred over the head with a cue stick, breaking the stick. The fistfight continued. She then stabbed Alfred three times—once in the head and twice in the back. There was "[b]lood everywhere."

Cleveland "grapple[d]" with Alfred and wrestled him to the ground. Alfred deduced that at some point during the scuffle Cleveland slammed Alfred's head into the wall. Alfred did not specifically remember this occurring, but he believed it happened

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[3] Alfred testified he was not sure who else became involved. Barfield testified it was her.

because there was a hole in the wall the size of his head, his head was swollen, and he received 10 medical staples on his head. In a subsequent interview, Alfred told a sheriff's deputy that someone "picked him up and slammed him into a wall . . . ."

Alfred passed out and later regained consciousness. At some point, the visitors left. Alfred crawled next door, where his neighbor called 911. Medical and law enforcement personnel responded. Alfred was flown by helicopter to the hospital, where he was treated for stab wounds and a fractured skull. When Alfred was discharged from the hospital, he returned home and reported that his car and certain personal property had been taken without his permission.

Alfred's neighbor testified about his observations on the day of the incident. The neighbor was cleaning his garage in the early morning hours of January 30 when he saw Alfred and three other people—one male and two females—in front of Alfred's house. Later that morning, the neighbor saw the females walk in and out of Alfred's garage and place laundry detergent in Alfred's car. One of the females approached the neighbor and asked to borrow jumper cables. The neighbor later saw the male and both females drive away. About 10 minutes after that, Alfred stumbled into the neighbor's garage and fell against a car, bleeding from his head and body, which prompted the neighbor to call 911. The neighbor indirectly identified the male suspect as Cleveland.[4]

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4 The neighbor identified the male suspect in a photo lineup. At trial, he testified Cleveland looked like the person in the photo he selected.

After Alfred was discharged from the hospital, the sheriff's deputy who had responded to the 911 call interviewed him. Alfred told the deputy (1) he saw Barfield take a silver chain from a container and put it in her pocket; (2) Cleveland denied Barfield had done so; (3) Cleveland punched Alfred in the face; (4) someone slammed Alfred's head into the wall; and (5) Barfield hit Alfred over the head with a wooden stick and stabbed him.

On February 19 (about three weeks after the incident), police recovered Alfred's stolen car in San Bernardino.

Defense Evidence

Barfield was the only defense witness. She had been dating Cleveland for about a year and a half and was pregnant with his child as of the date of the incident.

Barfield testified she had met Alfred about three or four weeks before the incident when he and another man came to Cleveland's house. Barfield overheard a discussion about a car, then Cleveland left and returned with Alfred's car. The defense insinuated Alfred had loaned his car to a prostitute.

On the night of the incident, Barfield was with Cleveland at a gas station in San Bernardino when Alfred arrived and invited them to his house. Barfield went to her house first to drop off her bikes, then Alfred, Cleveland, and Horlacher picked up Barfield in Alfred's car, which Cleveland was driving. They drove approximately 30 minutes to Alfred's house in Victorville.

Once there, Alfred provided the group with methamphetamine, marijuana, and alcohol. Cleveland and Barfield sat on one couch; Alfred and Horlacher sat on another.

Barfield saw Alfred "rubbing up and down on [Horlacher's] thigh area" with his hand. He told Horlacher "he didn't bring her up there for just what she was doing" (i.e., just to smoke his methamphetamine). The group then went to the backyard to play billiards. After about 30 minutes, Barfield went inside to the bathroom, and Horlacher followed her. Barfield was ready to go home, so she asked Horlacher "if she was gonna do what she was supposed to do for coming up there so we can get ready to go . . . ."

According to Barfield, Alfred then "busted in on" the women in the bathroom and groped Barfield's breasts and buttocks. Barfield and Horlacher pushed past Alfred, who was blocking the door, and left the bathroom. When Alfred followed, Barfield hit him in the side of the head with a pool cue. Alfred grabbed his head and called Barfield "[a] crazy bitch."

Barfield believed "Cleveland probably had a better ability to defend [her] than [she,] [her]self," so she and Horlacher looked for Cleveland. When Alfred "still approached" Barfield, she "retrieved a pocket knife from [Horlacher] and . . . stuck [Alfred] with it" one time. Alfred continued calling Barfield "a crazy bitch," then found Cleveland in the living room. Alfred approached Cleveland, said, "Your bitch hit me," then "sucker-punched" Cleveland in the face, splitting his lip. Alfred turned and started walking toward Barfield. Cleveland "reached out and . . . hit" Alfred, causing him to stumble and fall head first into the wall. Barfield testified Alfred "wasn't physically thrown into the wall."

Alfred ended up "in a crawling position" on the floor. Cleveland got a wet towel from the bathroom and tended to Alfred for 15 or 20 minutes. Alfred told the visitors

they could use his car to get home, and he would pick it up later. Barfield said she would drive because Cleveland "had injuries" (i.e., his split lip).

Barfield and Horlacher walked to the car and back a few times over the course of several minutes. Barfield saw Horlacher put a bag of laundry detergent in the trunk of the car. Cleveland gave Barfield the keys to Alfred's car, but it would not start. She went into Alfred's garage and found "[a] battery thing that you plug up that you can start the car with," which worked.[5] Cleveland, Barfield, and Horlacher got in Alfred's car and drove off together.

Barfield was later arrested in Alfred's car. Despite her claim that Alfred let the visitors use his car to get home, Barfield admitted at trial that she never contacted Alfred to return his car. She also admitted at trial that she had lied repeatedly to law enforcement to protect Cleveland.[6]

Barfield denied taking any of Alfred's personal property, and testified inconsistently about whether anyone else had done so. For example, although Barfield initially claimed she saw Horlacher take only laundry detergent, Barfield acknowledged

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[5] Barfield testified inconsistently about whether she ever asked the neighbor for help starting the car.

[6] For example, Barfield initially failed to disclose that Cleveland was present during the incident; then she claimed Horlacher had struck Alfred in the head with a bottle; then Barfield admitted she had struck Alfred with a pool cue (but did not mention any stabbing); finally, she admitted the stabbing, but acknowledged that her description of it to law enforcement differed from her description of it at trial.

that Horlacher later offered Alfred's watch to Cleveland. Barfield also later saw Alfred's laptop in his car.

Barfield pleaded guilty to "assault with a deadly weapon, use of a knife, and great bodily injury" in connection with the incident, and was in custody at the time of trial.

Prosecution Rebuttal Evidence

A sheriff's detective testified he interviewed Barfield on February 19, 2015, after she was arrested in possession of Alfred's car. Barfield told him the first time she had seen Alfred's car was the night before, and that Horlacher took Alfred's laptop and laundry detergent. The detective searched Alfred's house and did not find any methamphetamine, but he did find a methamphetamine pipe.

Charges, Jury Verdicts, and Sentencing

In the operative amended information, the prosecution charged Cleveland with four offenses: attempted murder (§§ 187, subd. (a), 664; count 1); assault with a deadly weapon (§ 245, subd. (a)(1); count 2); first degree residential robbery (§ 211; count 3); and carjacking (§ 215, subd. (a); count 4).[7] As to each count, the prosecution alleged Cleveland personally inflicted great bodily injury on Alfred. (§ 12022.7, subd. (a); hereafter, § 12022.7(a).) It was further alleged Cleveland had suffered a variety of prior convictions.

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7 Barfield and Horlacher were also initially charged with the same offenses. As noted, Barfield pleaded guilty to certain of the charges. The record does not indicate how Horlacher's charges were resolved.

The jury found Cleveland guilty of assault with a deadly weapon and carjacking, and not guilty of attempted murder and robbery (or any lesser included offenses). The jury found true the allegation that Cleveland personally inflicted great bodily injury in connection with the assault, but not the carjacking. Cleveland waived a trial on his priors and admitted to having one prior conviction for a serious or violent felony.

The trial court sentenced Cleveland to 15 years in prison, consisting of 10 years on the carjacking conviction (the five-year midterm, doubled for the strike prior), plus a five-year enhancement based on his admission of a prior conviction for a serious or violent felony. The court also imposed, but stayed under section 654, a two-year term on the assault with a deadly weapon conviction. The court struck the great bodily injury enhancement.

Cleveland appeals.

DISCUSSION

Cleveland challenges the sufficiency of the evidence supporting his convictions for assault with a deadly weapon and carjacking, and the great-bodily-injury enhancement attached to the assault conviction. He also contends we should remand for resentencing so the trial court can exercise its newly granted discretion to strike his prior serious felony enhancement.

I. *Assault With a Deadly Weapon*

Cleveland was charged with committing "an assault upon Alfred . . . with a deadly weapon, to wit, [a] [k]nife." The prosecution acknowledged there was no evidence showing Cleveland personally used the knife. Accordingly, the prosecution argued

Cleveland was guilty as an aider and abettor of the direct perpetrator who stabbed Alfred. Cleveland maintains there is insufficient evidence to support his conviction on this theory. We disagree.

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; § 31 ["All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed."].) "An aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " (*Prettyman*, at p. 259.)[8]

"Factors to be considered by the trier of fact in determining 'whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.' " (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273

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8 "[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' " (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) In this case, the trial court instructed the jury regarding intended crimes (see CALCRIM No. 401), but not the natural and probable consequences doctrine (see CALCRIM No. 402). Accordingly, we do not address the latter. (See *McCoy*, at p. 1117.)

(*Garcia*).) " 'Whether [a] defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

We conclude the record contains substantial evidence from which the jury could reasonably find Cleveland aided and abetted the stabbing of Alfred. Barfield admitted she stabbed Alfred one time. Alfred, however, testified he was stabbed three times, and there was "[b]lood everywhere." The jury could reasonably have concluded that even if Cleveland was initially unaware that Barfield intended to stab Alfred (and, thus, he could not have aided and abetted her in committing *that* stabbing), he became sufficiently aware of her intent after the first stabbing but *before* the second and third stabbings, and that he intentionally aided and abetted her commission of the latter stabbings by remaining engaged in fisticuffs with Alfred, thereby distracting and incapacitating Alfred with the purpose of facilitating Barfield's further assault on him.

The general factors for determining aider-and-abettor liability further support the jury's finding that Cleveland acted with the requisite knowledge and intent. (See *Garcia, supra*, 168 Cal.App.4th at p. 273.) Cleveland and Barfield were in a dating relationship, she was pregnant with his child at the time of the crime, and she admitted at trial she had lied to law enforcement to protect him. (*Ibid.* [" 'companionship' " is a relevant factor].) Cleveland was at the scene when Barfield committed the underlying offense. (*Ibid.* [" 'presence at the scene of the crime' " is a relevant factor].) Indeed, it was Cleveland's idea to bring Barfield there. In addition, they conferred with each other in the kitchen immediately before the crime was committed, Cleveland did nothing to prevent the crime

from occurring, and they fled together in Alfred's car after the crime was completed. (*Ibid*. [" 'conduct before and after the crime,' " " 'failure to take steps to attempt to prevent the commission of the crime,' " and " 'flight' " are relevant factors].)

Although Barfield testified Cleveland rendered aid to Alfred after the stabbing, the jury was not required to believe her testimony. Moreover, the jury could have concluded Cleveland was helping merely to minimize his criminal liability rather than for altruistic purposes.

II. *Great Bodily Injury Enhancement*

Cleveland also challenges the sufficiency of the evidence supporting the jury's true finding on the allegation that he personally inflicted great bodily injury in connection with the assault. (See § 12022.7(a).)[9] He maintains there is no evidence indicating he *personally inflicted* great bodily injury, as required, because the "only evidence" of such injuries shows they resulted from "the knife stabbing and striking of Alfred . . . with a pool cue," neither of which Cleveland directly perpetrated. We disagree.

A great bodily injury enhancement under section 12022.7(a) may only be imposed on a defendant who *personally inflicts* such injury through direct contact with the victim; it is insufficient merely to aid and abet another who does so. (§ 12022.7(a); see *People v. Modiri* (2006) 39 Cal.4th 481, 495 (*Modiri*) ["The injury-producing act must be done by

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9 Section 12022.7(a) states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

the defendant 'himself,' and not by someone who merely 'aided or abetted the actor directly inflicting the injury.' "].)[10] "[N]othing in the terms 'personally' or 'inflicts,' when used in conjunction with 'great bodily injury' . . . necessarily implies that the defendant must act alone in causing the victim's injuries." (*Modiri*, at p. 493.) Thus, when a defendant participates in a group attack on a victim and "the evidence is . . . conflicting or unclear as to which assailant caused particular injuries in whole or in part" (*id.* at p. 496), the defendant may still be said to have "personally inflicted" great bodily injury so long as he or she personally applied physical force "sufficient to produce great bodily injury either (1) *by itself*, or (2) *in combination* with other assailants" (*id.* at p. 494, italics added). Cleveland acknowledges the trial court properly instructed the jury regarding these principles.[11]

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10 "Although the issue in *Modiri* involved personally inflicting great bodily injury under section 1192.7, subdivision (c)(8), the court in *Modiri* applied its holding equally to the personal infliction requirement under section 12022.7." (*People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1417, fn. 2.)

11 The trial court instructed the jury with CALCRIM No. 3160 as follows: "If you conclude that more than one person assaulted Alfred . . . and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on Alfred . . . if the People have proved that: [¶] 1. Two or more people, acting at the same time, assaulted Alfred . . . and inflicted great bodily injury on him; [¶] 2. The defendant personally used physical force on Alfred . . . during the group assault; [¶] AND [¶] 3A. The amount or type of physical force the defendant used on Alfred . . . was enough that it *alone* could have caused Alfred . . . to suffer great bodily injury; [¶] *OR* [¶] 3B. The physical force that the defendant used on Alfred . . . was sufficient *in combination* with the force used by the others to cause Alfred . . . to suffer great bodily injury. [¶] The defendant must have applied substantial force to Alfred . . . . If that force could not have caused or contributed to the great bodily injury, then it was not substantial." (Italics added.)

However, Cleveland contends there is no evidence indicating he personally inflicted great bodily injury because he was merely an aider and abettor to the only actions that caused Alfred great bodily injury—hitting him in the head with a pool cue and stabbing him with a pocketknife. This contention ignores the extensive evidence showing that someone slammed Alfred's head into a wall with sufficient force to leave a head-sized dent.[12] The jury could reasonably have concluded that it was Cleveland who slammed Alfred's head into the wall,[13] and that this physical force personally and directly applied by Cleveland to Alfred was sufficient—"either (1) by itself, or (2) in combination" (*Modiri, supra*, 39 Cal.4th at p. 494) with the blow from the pool cue—to fracture Alfred's skull, require stitches, and knock him unconscious. Accordingly, substantial evidence supports the jury's finding that Cleveland personally inflicted great bodily injury on Alfred.

III. *Carjacking*

Cleveland challenges his carjacking conviction on the basis insufficient evidence supports the jury's finding that he formed the intent to take Alfred's car before or while using force or fear to do so. We disagree.

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12 Cleveland did not address this evidence in his appellate briefing, even though the Attorney General did.

13 This conclusion is strongly supported by the fact Cleveland was engaged in a fistfight with Alfred immediately before Alfred's head was slammed into the wall; and Barfield testified that Cleveland (who was in a better position to defend her from Alfred than she was) struck Alfred, causing him to stumble into the wall.

" 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215; see *People v. Gomez* (2011) 192 Cal.App.4th 609, 618.) "The requisite intent—to deprive the possessor of possession—must exist before or during the use of force or fear." (*Gomez*, at p. 618.)[14] Because " '[t]here is rarely direct evidence of a defendant's intent,' " it is usually established by circumstantial evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

The record contains substantial evidence from which the jury could reasonably infer that Cleveland formed the intent to take Alfred's car without consent before or while using force or fear to do so. Critically, *immediately* before Cleveland's use of force, Alfred directed his visitors to "get out of [his] house." The group had driven 30 minutes from San Bernardino to Victorville in Alfred's car, without which they had no apparent way of getting home. Based on this evidence, the prosecutor argued in closing that Cleveland attacked Alfred to take his car.[15] The prosecutor emphasized the need for the

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14 The jury was instructed in this regard as follows: "The defendant's intent to take the vehicle must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit carjacking." (See CALCRIM No. 1650.)

15 For example, the prosecutor argued, "[O]kay, I'm not gonna think about how I get out of this place as . . . I'm doing what I'm doing to this guy? No. He had the keys on him. He gave them to Miss Barfield to drive away."

jury to find that Cleveland formed this intent before or during his use of force; otherwise, "he didn't commit carjacking." By contrast, the defense argued Alfred loaned his car to the visitors to get home—despite the fact Barfield had just hit him with a pool cue and stabbed him, Cleveland had just slammed him headfirst into a wall, and no one ever contacted him again to return his car. It was not unreasonable for the jury to find the prosecution's explanation of the evidence more reasonable than the defense's explanation.

Cleveland argues the facts of this case resemble those of *People v. Morris* (1988) 46 Cal.3d 1, a capital robbery-murder case in which the Supreme Court reversed the robbery conviction. We are not persuaded. In *Morris*, the only evidence of the defendant's intent to rob was the fact that someone who looked like him later presented at a department store a credit card that a third party had loaned to the victim. (*Id.* at pp. 10-11, 20.) There was no evidence about the circumstances leading up to the taking of the credit card. (*Ibid*.) Thus, the court reasoned, the conviction was based on impermissible speculation about those circumstances. (*Id.* at p. 21.) Here, by contrast, the victim, himself, testified about the circumstances of the carjacking—immediately after he told his visitors to leave, Cleveland and Barfield attacked him, then took his car.

Cleveland also argues the fact the jury acquitted him of *robbery* indicates he also lacked the requisite intent to commit *carjacking*. But his defense counsel argued in closing that the "[b]est evidence seems to be" that the "pilfer[ing]" of Alfred's laundry detergent "and some other personal items" was an "*after the fact* revenge taking *by Miss Horlac[h]er*" (italics added), not a *premeditated* robbery *by Cleveland*. By contrast, *Cleveland* possessed Alfred's car keys *before and during* the attack. The jury could

reasonably have accepted the *defense* explanation of the *robbery* evidence, and the *prosecution* explanation of the *carjacking* evidence.

Similarly, Cleveland argues the fact the jury "untethered the great bodily injury enhancement from the carjacking count"—that is, it found the allegation true as to the assault count, but not true as to the carjacking count—"demonstrates that jurors did not find that the force applied to [Alfred] was accomplished with a pre-existing intent to take the car." We are not persuaded. Cleveland engaged in a fistfight with Alfred immediately after being told to leave. The jury could have associated this conduct with the carjacking, notwithstanding the fact he subsequently remained engaged in the fistfight to aid and abet Barfield's stabbing of Alfred.

IV. *Prior Serious Felony Enhancement*

The trial court sentenced Cleveland to a consecutive five-year term under section 667, subdivision (a) for his prior serious felony conviction. At the time of sentencing, the trial court was required to impose this term. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) While this appeal was pending, the Governor signed SB 1393, which amended sections 667 and 1385 to give trial courts discretion during sentencing to strike or dismiss five-year prior serious felony enhancements in the "furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) The new law took effect on January 1, 2019. (*Garcia*, at p. 971.)

After we issued our original opinion, Cleveland filed a petition for rehearing arguing that SB 1393 applies retroactively and gives the trial court sentencing discretion to strike his five-year enhancement. The Attorney General filed a response agreeing with

Cleveland. We, too, agree that SB 1393 applies retroactively to this case. (See *Garcia*, *supra*, 28 Cal.App.5th at pp. 971-973.) Accordingly, Cleveland is entitled to a limited remand to afford the trial court the opportunity to exercise its newly vested discretion under SB 1393. We express no view on how the trial court should exercise its discretion.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. The trial court is directed to exercise its discretion under SB 1393 to determine whether to strike the five-year enhancement for Cleveland's prior serious felony conviction. Upon resentencing, the trial court is directed to issue a new abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.